STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

RHODE ISLAND STATE LABOR
RELATIONS BOARD CASE NO: ULP-4982

-AND-

STATE OF RHODE ISLAND

DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter Board) on an Unfair Labor Practice Complaint (hereinafter Complaint) issued by the Board against the State of Rhode Island (hereinafter Employer) based upon an Unfair Labor Practice Charge (hereinafter Charge) dated April 1, 1995 and filed on April 12, 1995 by R. Council 94, AFSCME, AFL-CIO. (hereinafter Union).

The Charge alleged:

Violation of Section 28-7-13 Paragraphs 6, and 10

The State has violated the above sections by failing to negotiate changes in working conditions. The State has unilaterally changed the manner in which sick leave is handled.

Following the filing of the Charge, an informal conference was held on May 17, 1995 between representatives of the Union and Respondent and an Agent of the Board When the informal conference failed to resolve the Charge, the Board issued the instant Complaint on April 14, 1997. The Employer filed an answer to the complaint on April 22, 1997, and an amended answer on April 30, 1997, denying the allegations contained in paragraphs 3 and 4 of the complaint A formal hearing on this matter was held on June 26, 1997. Upon conclusion of the hearing, a briefing schedule was set by the Board. After two extensions agreed to by the parties, the Employer's brief was filed on August 13, 1997 and the Union's brief was filed on September 8, 1997. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and evidence presented at the formal hearing and the arguments of counsel contained within the post hearing briefs.

FACTUAL SUMMARY

This complaint has its genesis in the interpretation and implementation of R.I.G.L. 36-4-63, the so called "sick leave" bill. In 1983, the Rhode Island General Assembly enacted this legislation which regulates sick leave for employees of the State and the circumstances under which the State may require medical documentation to justify paid sick time. In 1988, this statute was amended to require medical proof of illness only after an employee discharged sick leave on three consecutive days. After this amendment, some branches of the State and/or State agencies failed to observe this new amendment and continued to require medical proof for all sick leave absences, regardless of their length. As a result, the Union complained to Mr. Richard Wessels, the Associate Director of Administration/Human Resources who eventually issued a memorandum on the sick leave issue (hereinafter Wessels October 7, 1988 memo) The Union was not happy with this Wessels' memorandum and complained to the Governor's office. Shortly thereafter, Union officials met again with Mr. Wessels and presented him with a revised memorandum (hereinafter Wessels November 2, 1988 memo) which had actually been drafted by Union officials. Wessels agreed to the memo and issued the same. The pertinent portions of the November 2, 1988 memo were as follows:

> Effective immediately, an employee must have used three (3) consecutive days or more of sick leave in the calendar year before a physician's certificate or other satisfactory evidence is required.
>
> Only after using three (3) consecutive sick leave days, any sick leave requests require a physician's certificate or other satisfactory evidence. Where employees utilize less than three consecutive sick leave days, no evidence of illness is required.
>
> Where individual employees' attendance records show extensive use of sick leave, progressive measures, including oral warnings and counseling., with Union representation, are to be utilized.

This memorandum was adhered to by the parties from 1988 until 1995 when Robert Tetreault, Mr. Wessel's successor, issued a new memo (hereinafter the Tetreault memo) reversing the Wessels memo. The Tetreault memo stated that State supervisory personnel could request medical proof when employees are out sick for less than three consecutive days. After the Tetreault memo was issued, the Union filed a grievance and this charge of unfair labor practice.

POSITION OF THE PARTIES

The Union argues that the undisputed evidence established that the parties reached agreement on how the sick leave bill would be interpreted and that the parties abided by that agreement from 1988 to 1995 The Union also argues that in 1992, the State unsuccessfully submitted contract proposals that attempted to modify the sick leave provision on the Master Contract. The Union argues that the State clearly knew of its obligation to negotiate this issue and that the State Labor Relations Act requires the State to negotiate any changes to this condition of employment, prior to enacting the same.

The State argues that the record is devoid of any evidence that the State committed any unfair labor practice. It also argues that arbitration was the appropriate forum for adjudication of the issue raised in this case and that the Union should not be afforded a "second bite at the apple." The State also argues that the Tetreault memo was merely a reiteration of Article 13.5 of the Master Contract and that therefore, any claim of a violation to collectively bargain over this issue is unfounded. Finally, the State argues that the Wessels memo was not the result of bilateral negotiations with an intent to amend the agreement and that all of the memorandums were issued within the State's proper exercise of its management rights.

DISCUSSION

The first matter to be addressed in this Decision and Order is the Employer's allegation that this matter belongs in arbitration and that the matter has already been decided by an arbitrator. This Board has stated in many decisions in the past and continues to so hold that a particular set of facts may give rise to both a contract violation and a violation under the Rhode Island State Labor Relations Act (hereinafter "Act"). This Board is clearly without jurisdiction to hear an allegation of contract violation and an arbitrator is without jurisdiction to determine if there has been a violation of the Act. However, the same set of facts may indeed give rise to two different complaints, one alleging a contract violation and the other alleging a violation of the Act. Both the Employer and the Union are free to pursue remedies in two different forms for these two different complaints. In this case, the Union has clearly alleged a violation of R.I.G.L. 28-7-13 (6) and (10). Were this Board to decline jurisdiction over this case, the Union would

be left with no avenue of remedy since this Board possesses exclusive jurisdiction in the State of Rhode Island to determine whether an unfair labor practice has occurred. This Board will not decline its jurisdiction to hear an alleged violation of the Labor Relations Act just because a party has alleged a cause of action in a different forum. To do so would be a clear abdication of the Board's statutory responsibility and this we will not embrace. Further, findings of an arbitrator are not binding upon this Board, as we have no way of reviewing that record or incorporating the same into these proceedings. We are only permitted to consider the testimony and evidence presented to us.

In this case, the Union presented the testimony of Mr. Jack P. Palazzo, its business agent and the former Vice President of Council 94 from 1987 to 1993 Mr. Palazzo testified that Council 94 had lobbied for the 1988 amendment to the sick leave law and that he had several discussion with Mr. Wessels concerning the State's interpretation of that law. (TR. p. 12) As a result of those discussions, Mr. Wessels issued his Nov. 2nd memo. Mr. Palazzo testified that this memo was a joint position in the interpretation in that both the State and the Union agreed. (TR. p. 13) Mr. Palazzo testified that the parties abided by the Nov. 2 memo for some time. There came a time when the Union filed class action grievance seeking an order that various State Departments cease and desist from requiring sick leave notes when an employee is out less than three (3) consecutive days. (TR. p. 14) On December 31, 1990, the State issued a decision on a class action grievance and relying upon Article 13.5, denied the grievance. *See* Union exhibit 6. Shortly thereafter, on March 20, 1991, the State rescinded its denial and sustained the grievance. *See* Union exhibit # 7. Thereafter, the State continued to adhere to the conditions set forth in the Wessels memorandum. All was then well until March, 1995 when the Tetreault memo was issued. (See Union Exhibit # 13) The Tetreault memo stated in pertinent part:

> Any employee who uses sick leave may be required to submit a physician's certificate, or other evidence satisfactory to the appointing authority, to support the requested leave.

The effect of this memorandum essentially reversed the 1991 rescission of the original denial of the class action grievance. Having proceeded to a grievance previously and having received a rescission of a decision by the State, the union should be entitled to rely

upon the binding effect of the prior grievance decision. In fact, both the Union and the State should have the right to rely upon previous grievance decisions as precedent for particular situations. The Union should not be expected to continue to litigate the same issue over and over again, especially without advance notification that the State wished to change its previously issued and accepted interpretation of the sick leave law. Such a posture on the State's part is not only unfair under these circumstances, it speaks poorly of the State's willingness to foster harmonious labor relations with Council 94. For these reasons, the Board finds a violation of R.I.G.L. 28-8-13 (10).

FINDINGS OF FACT

1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection and as such is a "Labor Organization" within the meaning of the Rhode Island Labor Relations Act.
3) On December 31, 1990, the State issued a decision on a class action grievance and relying upon Article 13.5 of the collective bargaining agreement, denied the grievance.
4) On March 20, 1991, the State rescinded its denial and sustained the class action grievance referenced in finding of fact # 3 above.
5) On March 23, 1995, the State issued a memorandum written by Robert G. Tetreault which contradicted the rescission of the class action denial referenced in finding of fact # 4 above.
6) The State did not discuss or negotiate its position with the Union prior to the issuance of the March 23, 1995 memo.

CONCLUSIONS OF LAW

1) The Union has proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (10).

ORDER

1) The Employer is hereby ordered to cease and desist from following the Tetreault memorandum until the same is negotiated with the Union in good faith.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Gina Vigliotti, Chairperson (Dissent)

Frank J. Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member

Ellen L. Jordan, Member (Dissent)

Paul E. Martineau, Member (Dissent)

Joseph Virgilio, Member

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: December 18, 1998

By: Donna M. Geofffroy, Administrator